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No. 80-1146

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

RONALD M. ZOBEL and PATRICIA L. ZOBEL,
Appellants,

v.

THOMAS WILLIAMS, Commissioner of Revenue,
and STATE OF ALASKA,
Appellees.

On Appeal from the Supreme Court of the State of Alaska

MOTION OF THOMAS WILLIAMS, COMMISSIONER OF REVENUE, AND STATE OF ALASKA TO DISMISS OR AFFIRM

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Appellees Thomas Williams, Commissioner of Revenue, and the State of Alaska move this Honorable Court, pursuant to Rule 16.1(b) and Rule 16.1(d) of the Rules of the Supreme Court of the United States, to dismiss the above-captioned appeal of appellants Ronald M. Zobel and Patricia L. Zobel, as not presenting a substantial federal question; or alternatively, to affirm the judgment of the Supreme Court of the State of Alaska. Should the jurisdictional statement of appellants be deemed a petition for certiorari, the State respectfully submits that such petition should be denied for the reasons stated in this motion.

I

INTRODUCTION

This case involves the constitutionality of a plan by which some of Alaska's oil wealth is distributed directly to its citizens in the form of dividends. The plan is one of the cornerstones of Alaska's program for long term development of its natural resources. Every aspect of the plan has received careful review, first by the residents of the State who voted directly to save a portion of Alaska's oil wealth for future generations, then by the Alaska legislature which spent years refining a plan to insure that present and future residents would share in that wealth, and finally by the Alaska Supreme Court which upheld the constitutionality of this dividend distribution plan. The plan itself is at the heart of this litigation, and before the legal issues concerning the plan can be viewed in proper perspective, it is necessary to understand the nature of the dividend distribution plan and the circumstances that led to its creation.

In 1976, the citizens of the State of Alaska adopted a constitutional amendment establishing a Permanent Fund. The fund is comprised of a percentage of the rentals, royalties and lease sale proceeds received from oil and gas development in the State. The principal of this fund may not be appropriated by the legislature for any purpose; only the earnings from investment of the principal may be utilized for government programs.

The Permanent Fund was created for two basic reasons. First was a recognition of the fact that the oil wealth available to Alaska today is limited in duration—that unlike funds generated by development of renewable resources

such as timber or fish, revenues from oil development will end at some fixed time. Government programs established from today's oil wealth will in the future require funding from other sources, which may or may not be available. Accordingly, steps had to be taken to insure that ongoing government programs did not become dependent on limited oil wealth. By placing a portion of the oil revenues in a constitutionally protected fund, and by permitting only the sustained earnings from the fund to be appropriated for government services, Alaskans insured that these services could continue for themselves and future residents far past the time when the oil itself is gone.

The Permanent Fund was also a response to a related public concern that large amounts of temporary resource wealth would encourage some political leaders to court the electorate with costly government projects which, in the end, would prove wasteful. The placement of at least a portion of oil revenues into a permanent fund helps prevent that waste.

The creation of the Permanent Fund solved some problems but it created others. Even the earnings from the fund are substantial, creating similar concerns over the waste of money and the unwarranted growth of government. Government growth is a concern everywhere, but in Alaska the problem has a peculiar twist. In most states, increases in government expenditures are irrevocably tied to an increase in individual taxes—a political debit to counterbalance the benefits bestowed by any new program. In Alaska, however, since public revenues can be raised easily by selling oil leases, personal taxes need not be imposed, and there is

no counterbalancing debit. New government programs can be established without ever affording the electorate a clear political choice. But increased government has social and political implications that *should* require political choices. A major Alaskan issue then has been how to create those choices—how to bring home to people the fact that it is money from development of *their* resources that is used to increase government.

The solution was unique in its simplicity. Instead of leaving the way open for all of the earnings from Permanent Fund principal to be used for funding new government programs, a portion of the earnings would be distributed directly to the people in the form of dividends. If subsequent legislatures chose to create new programs, they would be required to fund those programs by using money which otherwise would be distributed to the people. It was a system set up to duplicate the choices the legislature must make when it raises individual taxes to fund new government programs—a method of creating a constituency with an interest in overseeing the growth of government because with that growth would come a corresponding decrease in dividends received.

Direct distribution of Permanent Fund income however, posed the danger of stimulating enormous pressures by present day residents to maximize the earnings from the Permanent Fund immediately by developing resources at the most rapid possible rate and by investing Permanent Fund principal in high yield but risky investments. This

might benefit present Alaskans well, but would do a disservice to generations of future Alaskans.[1] The Alaska legislature concluded that the pressures for rapid and imprudent resource development could be best reduced by selecting a particular method of dividend distribution under which all residents would receive the same annual dividend, but dividends would be cumulative. The total amount received in any year, then, would increase over time, which in turn would give residents a personal interest in long term prudent management of the resources and of the Permanent Fund itself. At the same time the legislature realized that this method of distribution would accomplish other desired legislative purposes. It would provide an incentive for people to make Alaska their long term residence, and it would recognize the contributions that residents, past, present and future, have made and will make to the Alaska community.[2]

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[1]This is a particularly serious problem when distributing wealth from finite non-renewable resources like oil. If all of the present benefits from a renewable resource like timber or fish were to be distributed today, there would be little danger that future residents would be deprived of similar benefits. But the benefits from oil are available only so long as the oil remains. As trustee of the State's natural resources, today's government has an obligation to insure that tomorrow's residents will benefit at least in part from this finite resource.

[2]Under the dividend distribution plan adopted by the legislature, one-half the interest from the permanent fund is distributed on an annual basis to residents of the State. Each eligible person is entitled to claim annually one dividend for each full year of residence in the State since Statehood. AS 43.23.010(a). There is no durational residency requirement. A new resident qualifies immediately for a pro-rated portion of the first year's dividend upon becoming a resident of the State. AS 43.23.010(f), and AS 43.23.100 (7). The value of each dividend is computed each year on the

The permanent fund dividend program affords every resident of Alaska the same dividend for any year of residence, but a person who has been a resident of the State for a longer period than another will receive greater total amounts in any one year, because the dividends are cumulative. The appellants here have focused on that differential, asserting that since residents will receive differing amounts in any one year, the plan is in the nature of a durational residency requirement, one that is "inconsistent with the right to equal protection and the right of interstate migration." Appellants' Jurisdictional Statement, at p. 5.

II

ARGUMENT

A. The Permanent Fund Distribution Plan Does Not Infringe on the Right of Interstate Migration.

Appellants' claim that the dividend distribution plan infringes on their right to interstate migration, relies exclusively on a series of cases which deal with the question of whether states may single out newly arrived residents and deny them benefits which are available to all other residents. *Shapiro v. Thompson,* 394 U.S. 618 (1969) (one year residency requirement for welfare invalid); *Dunn v. Blumstein,* 405 U.S. 330 (1972) (one year residency requirement to vote invalid); *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974) (one year residency re-

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basis of one-half of the permanent fund income earned during the previous fiscal year divided by the total number of dividends paid during the most recent annual distribution. AS 43.23.030. If this figure for any one year is less than $50, the legislature is authorized to make a loan from the general fund to the dividend program sufficient to make the distribution at $50 per dividend. AS 43.23.050(c).

quirement for medical care invalid); *Sosna v. Iowa,* 419 U.S. 393 (1975) (one year residency requirement for divorce valid); *Starns v. Malkerson,* 326 F.Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971) (new residents may be required to pay higher tuition at a state university for one year). The theory underlying all of these cases is, in essence, that distinctions between established and newly arrived residents of a state must be justified by a "compelling state interest" when the distinctions penalize a basic and separate constitutional right—the right of interstate migration. The Court in *Dunn* put it this way:

> Durational residency laws impermissibly condition and penalize the right to travel by imposing their prohibitions on only those persons who have recently exercised that right. In the present case, such laws force a person who wishes to travel and change residences to choose between travel and the basic right to vote. Absent a compelling state interest, a state may not burden the right to travel in this way.

405 U.S. at 342 (footnote omitted; citation omitted.)

This Court has made it clear, however, that not all distinctions among residents of a state burden the right of migration between the states. By its memorandum decision affirming a district court opinion in *Starns v. Malkerson,* 326 F.Supp. 234 (D. Minn. 1970), *aff'd mem.,* 401 U.S. 985 (1971), and in *Vlandis v. Kline,* 412 U.S. 441, 452 (1973), the Court recognized that it was permissible for states to require new residents to pay higher tuition at a state university than that paid by longer term residents—a distinction justified by an assumption of past tax contributions by long term residents. In *Memorial Hospital v. Maricopa*

County, 415 U.S. 250 (1974), the Court commented that the right to travel is penalized only when recent migrants are denied "fundamental necessities of life." Most recently, in *Sosna v. Iowa*, 419 U.S. 393 (1975), the Court held that a statute which denied recent migrants access to the divorce courts for one year did not infringe on the right to travel. In *Sosna*, the Court found that Iowa's interest in controlling domestic relations in the State formed a rational basis for the waiting period. In addition, the Court concluded that a one-year waiting period for obtaining a divorce was reasonable, since unlike welfare or medical treatment for the poor, the need to use the divorce courts of the state was neither urgent nor immediate.

The method of dividend distribution at issue here is fundamentally different from the durational residency requirements in right to travel cases. The first difference is that the provisions of the dividend program apply uniformly to all residents. In *Dunn*, for instance, the Court held the onus of durational residency laws to be that they burdened the right to travel "by imposing their prohibitions on only those persons who have recently exercised that right." 405 U.S. at 342. The distinctions made in the permanent fund dividend plan, however, are *not* focused on newly arrived residents. A resident who has been in Alaska 10 years receives a different number of cumulative dividends than an eight year resident or a 15 year resident. These differences must be rationally justified, but it is critical to recognize that newly arrived residents are treated no differently than any other resident of the State—they qualify immediately for the same annual dividend and

enjoy the same right of accumulation as all other residents of the State.

The second major difference lies in the type of benefit conferred by the dividend plan. In the terminology of prior decisions by this Court, there is no "fundamental necessity of life" involved here, however broadly that term may be interpreted. This is not a case in which, through denying some service, the government penalizes or inhibits migration. Unlike medical benefits (*Maricopa County*), welfare (*Shapiro*), the right to vote (*Dunn*), or even the right to obtain a divorce (*Sosna*) all of which were withheld from recent migrants in right to travel cases, nothing at all is "prohibited" here. Prospective migrants need not "choose" as they consider a move to Alaska. *Dunn v. Blumstein, supra,* at 342. The only question is what additional benefits they will *gain*—the precise amount of a unique annual dividend bestowed only upon those who live in Alaska. There is no penalty on interstate migration—nothing remotely resembling the situation in *Shapiro, Maricopa County* or *Dunn.* If anything, the permanent fund dividend program provides an incentive for persons to exercise their right to migrate to Alaska.

Finally, and perhaps most important, the impact of the dividend plan provides a vivid contrast to previous durational residency cases. The permanent fund dividend plan distributes surplus oil revenues to residents using a distribution method that is designed to achieve long range goals—to insure that benefits accrue not only to present-day residents of Alaska, but to residents who have not yet come to the State. Each new resident receives exactly the same

rights of accumulation as those who have come before. If he remains a resident for the same period of time as another resident, he will receive the same amount of accumulated dividends. If a new resident does not reside in Alaska as long as another, he will receive less in the aggregate. But that will be the case whatever system of distribution is utilized. Even under the per capita system urged by appellants, a 10 year resident over the period of his residency will receive half as much as a 20 year resident and ten times as much as a one year resident. This disparity results from the fact that participation in the program arises simply from being a resident, which in turn gives rise to an interest in the resources. Persons who reside in the State for equal periods of time receive equal dividends, either under a per capita system or the cumulative system adopted in this plan. Under the cumulative system, the difference between the amount a new resident will receive initially and the total amount already received by a resident who arrived earlier is greater than it would be under a per capita system. But if the new resident lives in Alaska for the same total number of years as one who arrived earlier, the new resident makes up the initial difference in exactly the same period of time as he would under a per capita system, because he accumulates dividends at a higher rate. Under the cumulative system, equality is achieved in the aggregate, just as it would be under a per capita system.

The concept of equality in the aggregate would, of course, be meaningless if applied to the type of government programs at issue in *Shapiro* and *Maricopa County*. It makes no sense in the area of medical care to suggest that though someone does not qualify today because he has not

lived in the State long enough, he will qualify for similar medical care at a later time. If someone is sick, he needs the care today—what will happen later is irrelevant. Welfare benefits are similarly based on present need—a need that must be met now. The purpose of welfare, medical care or similar programs is to deal with present individual need. For those programs the appropriate basis of comparison to determine whether similarly situated persons are treated equally is obviously the similarity of the needs of both long-term and newly arrived residents *at the time those needs exist,* and not the similarity of aggregate benefits that each may ultimately receive under the program. But the permanent fund dividend plan is of a different nature. It is not based on need, "fundamental" or otherwise.[3] It is, instead, a program based purely on the status of residency—a long-term plan to distribute resource wealth in a manner consistent with certain basic policy objectives—primary among them being a wise and cautious approach to the management and development of Alaska's resources so that this generation of residents will not be the only group to benefit from them. And since this is a

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[3]It is certainly true that many residents, particularly Alaska Natives living in outlying communities and maintaining a limited subsistence lifestyle, were counting on using their dividends to enhance their cash incomes during the winter months. *See,* Affidavit of Thomas K. Williams, at p. 5, Appellees' Opposition to Stay. But any "need" felt by those residents was a result of having planned to receive their dividends and of having structured those dividends into their financial plans. The purpose of the dividend distribution is not aimed at relieving economic hardship or providing economic advantage. Obviously there is wide variance in the personal economic situations of individual Alaskans, and each resident will use his dividends in accordance with his own particular individual needs and desires, whatever they may be.

distribution program with long term objectives unrelated to present need, it is entirely appropriate to compare its impact on residents over the long term.

This is not to say, of course, that the method selected by the legislature for the distribution of dividends can be an arbitrary one. Like any legislative classification, one between residents must be rationally related to valid legislative goals. But since this plan does not penalize or burden the right to travel and in fact involves no infringement on any Constitutional right, a compelling state interest is not required. It is only necessary that the relationship be rational.

B. The Alaska Supreme Court Correctly Applied the Doctrines Established by This Court in Determining That the Purposes of the Permanent Fund Dividend Plan are Valid, and That Those Purposes are Rationally Related to the Particular Means Chosen to Effect Them.

The purposes of the dividend distribution program were specifically outlined in the legislation enacting the program. Appendix D, p. 61a, Appellants' Jurisdictional Statement. A major purpose of the plan is to "encourage increased awareness and involvement by the residents of the state in the management and expenditure of the Alaska permanent fund." Two additional purposes are set forth in the legislation—to provide "a mechanism for equitable distribution" of a portion of the State's natural resource revenues, and to reduce population turnover in the State.

Having concluded that the dividend distribution plan did not infringe on any fundamental Constitutional right, the

Alaska Supreme Court reviewed the distribution plan under the standards established by this Court in previous equal protection cases. *See, e.g., Foley v. Connelie,* 435 U.S. 291, 296 (1978) ("The State need only justify its classification by a showing of some rational relationship between the interest sought to be protected and the limiting classification."); *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976) ("Unless a classification trammels fundamental personal rights . . . our decisions presume the constitutionality of the . . . [statute] and require only that the classification challenged be rationally related to a legitimate state interest."); *Hughes v. Alexandria Scrap Corp.,* 426 U.S. 794, 814 (1976) (". . . a rational relationship . . . is all the Constitution requires."); *McGowan v. Maryland,* 366 U.S. 420, 425 (1961) (statute is invalid only if "the classification rests on grounds wholly irrelevant to the achievement of the State's objective."); *F. S. Royster Guano Co. v. Virginia,* 253 U.S. 412, 415 (1920) (". . . the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation."). Applying these standards, the Alaska Court concluded that there was a "fair and substantial" relationship between the purposes of the dividend distribution plan and the method of distribution.

First, the Alaska Supreme Court found that this distribution plan, under which every resident earns the same annual dividend and accumulates dividends with increased residency, uniquely insures wise and careful management of the Permanent Fund and Alaskan resources over the long term. This can readily be seen by comparing this plan to

the most obvious alternative—a per capita distribution each year to all residents, regardless of length of residency. As the Alaska Court noted, a per capita distribution would tend to jeopardize the principal of the Permanent Fund:

> 'as population increases, each individual share in the income stream is diluted. The income must be divided equally among increasingly larger numbers of people. If residents believed that twenty years from now they would be required to share permanent fund income on a per capita basis with the larger population that Alaska will no doubt have by then, the temptation would be great to urge the legislature to provide immediately for the highest possible percentage return on the investments of the permanent fund principal, which would require investments in riskier ventures. . . .
>
> Under AS 43.23, each resident will receive an increasing number of dividends the longer he or she resides in the state. Each person's share will have increased substantially after twenty years, instead of having been diluted as it would have been under a per capita distribution system. Under AS 43.23, all generations of residents, not only today's residents but future residents as well, will therefore have an interest in insuring that the permanent fund is managed prudently so that a healthy income stream will be available twenty, thirty, and forty years after they have begun to accumulate their dividends.'

Opin., pp. 31a-32a, Appendix A, Appellants' Jurisdictional Statement.

At the same time, a per capita distribution of permanent fund income would tend to create public pressure for immediate and rapid development of the State's now unde-

veloped mineral resources. The Alaska Supreme Court described this effect as follows:

> A per capita distribution is more likely to encourage the public to press for immediate and rapid development of the state's mineral resources, as each set of dividend recipients would want to see as much revenue as possible flowing immediately into the fund.

The Alaska Court concluded:

> Allowing benefits to increase with residency installs a counterbalance to this motivation, in that each year's recipients may stand to gain more by slowing development somewhat and increasing the size of the dividend in subsequent years, when those residents will presumably be getting an additional dividend for their additional year of residency.
>
> . . . .
>
> We think that installing this 'counterbalance' incentive system is a permissible goal, and that the classification system is fairly and substantially related to it.[4]

Opin., pp. 32a-33a, Appendix A, Appellants' Jurisdictional Statement.

A second justification that the Alaska Court discussed for this method of dividend distribution stems from the

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[4]The need to encourage sound long term management of the State's resources obviously goes far beyond mere "preservation of the public fisc," as appellants characterize this purpose, or a simple desire to save money on a particular program such as medical care for the poor. Appellants also suggest that as in *Maricopa County*, where officials argued that they could not gain political support to fund free medical care unless they barred new residents, this is a case where Alaska seeks to justify an otherwise impermissible classification on the basis that it will engender political support for the program. But here, unlike *Maricopa County*, there

legislature's view of what equity required in the distribution of resource revenues. The legislature believed that the contributions residents make through their participation in the Alaska community should be recognized by increasing the dividends they receive as their length of residence in the community increases. That, of course, does not mean that the plan is a vehicle for rewarding only the contributions made by already existing residents.[5] The distribution program recognizes that new residents will also contribute to the Alaska community since *every* resident from the instant he arrives begins to accrue the same benefits as one who has already lived in Alaska. Newer residents are in no

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is no discrimination directed at new residents and no "otherwise impermissible classification." And here, unlike *Maricopa County*, there is no effort to gain the political support of one group by excluding another from benefits. The political incentives built into this program have nothing to do with gaining support for the dividend distribution. The incentives apply equally to all residents, old and new, and are aimed at achieving the valid, long term goal of insuring that Alaska's resources are developed in a prudent manner.

[5]The Alaska Court found that in distributing dividends equitably, it was reasonable for the legislature to consider not only the contributions that Alaska residents will make to the enhancement of the Alaska community in the future, but also those previously made by residents since statehood. The Court noted:

> 'Many [residents] have paid taxes; many have contributed to the economic life of the state; many have contributed to the cultural life of the state and have fostered the cultural diversity that makes Alaska so unique; many have contributed their ideas and have participated in the political life of the state; all have endured the rigors of a harsh climate; and all have borne the impact of a high cost of living.'

Opin. p. 22a, Appendix A, Appellants' Jurisdictional Statement.

different position than those who have preceded them in the State.[6]

It is important to stress that this is not a case like *Shapiro* where States attempted to justify a denial of necessary benefits to a new resident on the basis that he had not previously made contributions in the form of taxes to the State. That argument was obviously fallacious since present need has no logical relationship either to past payment of taxes or to length of residency. But the purpose of the permanent fund dividend plan is not to address any present need, be it "fundamental," as it was in the case of medical care (*Maricopa County*), or merely desirable, as in the case of higher education (*Starns v. Malkerson; Vlandis v. Kline*). Viewing the program purely from the narrow perspective of the individual benefits conferred (as opposed to the program's primary long range goals), it is truly a "bonus" of residency. The Alaska Court acknowledged that granting a "bonus" may not be appropriate when it infringes upon some fundamental right, but when no rights are infringed:

> . . . the state may recognize these contributions. The fit between means and ends need not be perfect. We

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[6]Indeed, they are in a better position, as the Alaska Supreme Court recognized:

> . . . the new resident who arrives in 1980 and stays twenty-one years will not only get twenty-one dividends in 2001, but will have received a total of 210 dividends during the intervening years. In that respect also, the new resident may be better off, in that the twenty-one-year resident of 1980 receives twenty-one dividends in 1980, but no 'back payments' for the 210 dividends he or she would have received had the program been established in 1959.

Opin., p. 17a, Appendix A, Appellants' Jurisdictional Statement.

> think the relationship is fair and substantial. There clearly is a correlation between one's length of residency and the extent to which that individual has been able to make contributions to the community. We are not convinced that any workable alternative method of measuring past contributions is clearly preferable. Although the existence of a preferable alternative would not automatically render the relationship unfair or insubstantial, the absence of any preferable workable alternative is a strong indication that the classification chosen by the legislature is acceptable. We think that the relationship is as fair and substantial as the Alaska Constitution requires in this context.

Opin., p. 28a, Appendix A, Appellants' Jurisdictional Statement.

A final justification for the particular distribution method selected by the legislature is the goal of discouraging population turnover, a social problem that has plagued Alaska through its years of boom and bust with traditionally serious consequences. *See,* Opin., p. 23a, n. 33, Appendix A, Appellants' Jurisdictional Statement. The prospect of losing future dividend payments may not be enough by itself to stabilize the Alaska population, but a person has a strong incentive to maintain long term Alaska residence, since moving away means losing the substantial dividend payments that will have accumulated in future years.

The purposes of the dividend distribution plan have nothing to do with favoring the interests of old time Alaskans over the interests of new residents of the State. In contrast, the Alaska Supreme Court upheld this plan because it is one under which all Alaskans may benefit, now and long into the future. All share the same rights and all, in the end, benefit equally. The particular method of dis-

tributing permanent fund income selected by the Alaska legislature may not entirely solve the problems that we have discussed here. But the method of distribution is "fairly and substantially" linked to a solution of those problems. That is all that the Constitution requires.

III

CONCLUSION

The permanent fund dividend distribution plan itself is novel, but the legal issues raised by the plan have been resolved previously by this Court in a host of different contexts. Plenary consideration of this case would involve nothing more than the application of doctrines long established by this Court—doctrines that were thoughtfully and properly applied by the Alaska Supreme Court.

The State of Alaska respectfully urges this Court to dismiss this appeal for lack of a substantial federal question or, alternatively, to affirm summarily the decision of the Alaska Supreme Court.

Respectfully submitted,

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